

Isorua (Migration) [2021] AATA 3331 (26 August 2021)

DECISION RECORD

DIVISION: Migration & Refugee Division

APPLICANT: Mr Fleming Hasu ISORUA

CASE NUMBER: 1815890

HOME AFFAIRS REFERENCE(S): BCC201/302055

MEMBER: Carmel Morfuni

DATE: 26 August 2021

PLACE OF DECISION: Melbourne

DECISION: The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

Statement made 26 August 2021 at 5.25 pm.

C. Morfuni

Member

CATCHWORDS

MIGRATION – Partner (Temporary) (Class UK) visa – Subclass 820 (Partner) – genuine and continuing relationship – child of the relationship – relationship ceased – applicant left Australia – no joint financial commitments – no social recognition – decision under review affirmed

LEGISLATION

Migration Act 1958, ss 5, 65, 379
Migration Regulations 1994, Schedule 2, cls 820.211, 820.221; rr 1.03, 1.09, 1.15

CASES

He v MIBP [2017] FCAFC 206

STATEMENT OF DECISION AND REASONS

APPLICATION FOR REVIEW

1. This is an application for review of a decision made by a delegate of the Minister for Home Affairs to refuse to grant the applicant a Partner (Temporary) (Class UK) visa under s 65 of the *Migration Act 1958* (Cth) (the Act).
2. The applicant applied for the visa on 20 January 2016 on the basis of his relationship with his sponsor. At that time, Class UK contained only one subclass: Subclass 820 (Partner). The criteria for the grant of this visa are set out in Part 820 of Schedule 2 to the *Migration Regulations 1994* (Cth) (the Regulations). The primary criteria must be satisfied by at least one applicant. Other members of the family unit, if any, who are applicants for the visa need satisfy only the secondary criteria.
3. The review applicant is also the visa applicant and is referred to in this decision as “the applicant”. The applicant provided the sponsor’s postal address and email address as that of the sponsor and authorised her as the person to receive written correspondence on his behalf including by email, in his Migration Application.
4. The delegate refused to grant the visa on the basis that the visa applicant did not satisfy cl 820.211(2)(a) because the applicant did not satisfy the definition of Spouse or Defacto partner under the Act (ss 5F and 5CB respectively), nor the time of decision requirements of subclauses 801.221(2)-(6) inclusive or subclause (8).
5. The Tribunal has considered in making this decision, the President’s Direction *Conducting Migration and Refugee Reviews*’ made on 1 August 2018. Paragraph 8.2 of that President’s Direction states:

As a general rule, where the Minister for Immigration (Minister) or delegate has made an adverse decision on particular criteria or issues, the AAT should restrict its review to those matters.

6. Material before the Tribunal

7. The Tribunal had before it the Department and Tribunal Files, the relevant legislation being the Migration Act 1958 (the Act), the Migration Regulations 1994 (the Regulations), the migration Procedures Advice Manual 3 (PAM 3), submitted documentation including the most recent response to hearing together with all attachments, information and submissions provided by or on behalf of the review and visa applicants and any oral or written evidence presented at the hearing.

8. Background

9. The Applicant arrived in Australia on 10 October 2011 holding a Student (subclass 572) visa.
10. The Applicant was granted a student (subclass 572 visa) on 11 October 2013.
11. The Department received information on 27 July 2015 that the applicant’s (student enrolment) had been cancelled;

12. On 20 January 2016, the applicant lodged a combined Partner (subclass 820/801) visa application and was subsequently granted an associated Bridging A (subclass 010) visa.
13. The applicant departed Australia on 8 July 2019 as the holder of a Bridging A (subclass 010) visa granted on 20 January 2016.

14. **Delegate Decision**

15. The delegate's reasons are set out in a decision record a copy of which was provided to the Tribunal by the Applicant when he lodged the Application for Review on 16 January 2019.

16. **The Hearing**

17. The sponsor appeared before the Tribunal by telephone on 25 August 2021 to give evidence and present arguments. The applicant did not appear. There were no other witnesses.
18. Due to the COVID-19 Pandemic, the hearing was set down as a video hearing however due to technical issues was conducted by telephone to which the sponsor who was the only participant at the hearing, consented to such contact.
19. On 23 July 2021, the Tribunal invited the review applicant to an in-person hearing scheduled to take place on 25 August 2021. The Tribunal advised that it may wish to take evidence from the review applicant's partner, and to include the partner's telephone number and email address in the response to the Tribunal's invitation. The Tribunal further requested that the applicant bring the original birth certificate of the child and an original marriage certificate to the hearing. The invitation was dispatched to the applicant's recipient (who is the partner). Attached to the invitation is a hearing response form for the applicant to submit to the Tribunal within 7 days of receipt.
20. On 23 July 2021, further correspondence was forwarded to the review applicant (via his authorised recipient) seeking confirmation that he wished to proceed with his application for review and attached a withdrawal form. The Tribunal requested that the applicant complete and submit the withdrawal form if he did not wish to proceed. There was no response to the correspondence.
21. On 18 August 2021 the Tribunal dispatched an automated SMS hearing reminder text message to the review applicant's telephone number at 11:00:41 AM. The message sent was *'Reminder - Your AAT hearing is on 25/08/21. Please check the hearing invitation to confirm details. If you have not replied to your hearing invitation, please do so immediately. Please do not reply to this number. Any questions, call 1800 228 333.'*
22. On 20 August 2021 the Tribunal again wrote to the review applicant advising that due to the Covid 19 pandemic *stay at home orders* in effect across Metropolitan Melbourne, the hearing would proceed by video conference. The Tribunal again requested to take evidence from the authorised recipient (the applicant's partner) and requested (by way of confirmation), that her contact details be provided to the

Tribunal. The Tribunal also again requested a response, and that the applicant provide the Tribunal with certified copies of the marriage and birth certificates. The invitation was dispatched directly to the review applicant, as well as his nominated recipient in accordance with s379G of the Migration Act (and s379G(2)).

23. On 25 August 2021, the day of hearing, the Tribunal further attempted to contact the review applicant. Three attempts to contact him were made by Tribunal staff at the following times 08:58am, 09:01am and 09:02am on that day. The Tribunal was unable to contact the review applicant, as his telephone appeared to have been disconnected and the Tribunal did not receive any independent request from him that the hearing be postponed nor advice from him or his authorised recipient that his telephone number had changed.
24. For the following reasons, the Tribunal has concluded that the decision under review should be affirmed.

CONSIDERATION OF CLAIMS AND EVIDENCE

25. The issue in the present case is whether the applicant is the spouse or defacto partner of the sponsor according to the definitions in Sections 5F and 5CB of the Act and whether he meets the criteria in Regulation 1.15A(3) or 1.09A(3) of the regulations

26. SPOUSE/DE FACTO (cl 820.211(2)(a), (3)(e), (4)(e), (5)(e), (6)(d), cl 820.221)

Whether the parties are in a spouse or de facto relationship

27. Clauses 820.211 (2)(a) and 820.221 require that at the time the visa application was made **and** at the time of this decision, the applicant is the spouse or de facto partner of an Australian citizen or Australian permanent resident or an eligible New Zealand citizen. In the present case the applicant claims to be the spouse of the sponsor who is an Australian citizen.
28. 'Spouse' is defined in s 5F of the Act and provides that a person is the spouse of another where the two persons are in a married relationship. Persons in a married relationship must be married to each other under a marriage that is valid for the purposes of the Act, there must be a mutual commitment to a shared life as a married couple to the exclusion of all others, the relationship must be genuine and continuing, and the couple must live together, or not live separately and apart on a permanent basis: s 5F(2)(a)-(d). In forming an opinion about these matters, regard must be had to all of the circumstances of the relationship. This includes evidence of the financial and social aspects and the nature of the parties' household and their commitment to each other as set out in reg 1.15A(3), which is extracted in the attachment to this decision. Each of the specific matters contained in reg 1.15A(3) are effectively questions which must be answered: *He v MIBP* [2017] FCAFC 206.

Are the parties validly married?

29. If the parties are validly married, they may meet the requirements of a married relationship, but not a de facto relationship. The evidence indicates that the parties married in a civil ceremony on 1 August 2016 (copy Victorian registered civil

marriage certificate provided). They also claim to have had a church wedding on 20 September 2015 as outlined in the sponsor's written statement dated 24 May 2018 and the applicant's application for migration. On the basis of the whole of the evidence before it including the documentary verification, the Tribunal concludes that the parties were married to each other in a civil ceremony on 1 August 2016 under a marriage that is valid for the purposes of the Act as required by s 5F(2)(a).

30. The sponsor's above written statement states that the parties have a daughter born on 6 October 2016. No supporting official documentary evidence was submitted. There was no mention of a daughter in the review applicant's documentation at any stage nor did he make any subsequent claims or reference to her after her birth.

31. **Are the other requirements for a spouse relationship met?**

32. At the hearing, the Tribunal read out the requirements of Section 5F to the sponsor and the regulatory requirements. The sponsor stated that she and the applicant had not communicated for the last two years nor lived together, he having left Australia and that both of them accepted that there is no longer a committed relationship between them. She indicated that she will be seeking to obtain a divorce and that they had severed their relationship a short time before the applicant left Australia.

33. **Findings in relation to Regulation 1.15A(3)(a), (b), (c) and (d), and any other circumstances of the relationship under reg 1.15A(2).** The Tribunal makes the following findings:

- **Financial aspects of the relationship** – The sponsor indicated that there may be a joint bank account but that she intends to remove her name. The applicant stated in his migration application that there was a joint account. No documentary evidence has been provided.
- **Nature of the household** – at the date of decision, there is no household, living arrangements or sharing housework as the parties separated more than two years ago. In relation to any joint responsibility for care and support of children; The sponsor stated in her statement referred to above and in oral evidence that she has a daughter. There is no other evidence before the Tribunal in relation to the nature of the household.
- **Social aspects of the relationship** – including whether parties represent themselves to other people as being married to each other; the opinion of friends and acquaintances about the nature of the relationship; and any basis on which the persons plan and undertake joint social activities. There was no supporting evidence from friends, family or acquaintances as to the parties' married relationship, as to joint social activities and given the parties' separation of over two years and the sponsor's stated intention to obtain a divorce, the Tribunal concludes in the absence of any other evidence that none of the social aspects of the relationship are satisfied.
- **Nature of persons' commitment to each other** – including duration of the relationship; the length of time they have lived together; degree of companionship and emotional support they draw from each other; and whether they see the relationship as long-term. The sponsor's submitted written

statement to the Tribunal dated 24 May 2018 in support of the application has been considered. The Tribunal notes that the statement is not a sworn statement and no additional evidence was provided to the Tribunal to demonstrate the nature of the parties' commitment to each other. Based on the oral evidence of the sponsor there is no committed relationship at the date of decision. Accordingly, the Tribunal is not satisfied on the basis of the whole of the evidence before it, that the nature of the parties' commitment to each other is commensurate with that of a genuine and ongoing spouse relationship.

- **Any other circumstances of the relationship.**

- There was no additional relevant evidence in relation to other circumstances of the relationship.

34. The Tribunal finds that on the basis of insufficient evidence, and on the basis of the whole of the evidence and information before it, the requirements of Regulation 1.5A(3) and reg 1.15A(2) are not satisfied and thus, under Section 5F (2) (b)-(d) at the date of this decision, it finds that the parties do not have a mutual commitment to shared life to the exclusion of others; a genuine and continuing relationship; and that they do not live together and finds that they live separately and apart on a permanent basis.
35. On the basis of the above the Tribunal **is not** satisfied that the requirements of s 5F(2) are met at the time of this decision.
36. Therefore the applicant does not meet cl 820.211(2)(a) and cl 820.221 at the date of decision.
37. Clause 820.211 requires at the time of application, the applicant meets one of several alternative sub criteria. These include 820.211 (2) (c) which requires that the applicant was, at the time of application, sponsored by the sponsor, where such person has turned 18; or where they have not, by the sponsor's parent or guardian who has turned 18 and is either an Australian citizen, permanent resident or eligible New Zealand citizen (as defined in reg 1.03 of the Regulations). There was no sponsorship application on either the Department or Tribunal files and therefore apart from the parties' claims, no documentary evidence under the Act was provided as to sponsorship.
38. At the time of decision, the applicant must continue to be sponsored by the sponsor, and the sponsorship must have been approved by the Minister and be still in force. Exceptions apply in certain circumstances where the sponsor has died, or family violence has occurred, or a child is involved. For visa applications made on or after 18 November 2016, the sponsor must also have consented for the Department to disclose to each applicant any conviction for a relevant offence, unless the conviction has been quashed or otherwise nullified, or where the sponsor has been pardoned with the effect that he or she is taken never to have been convicted of the offence: cl 820.221. At the date of decision, there was no additional evidence as to sponsorship.
39. In relation to the exceptions, there is no evidence in this case as to family violence. The claimed sponsor is alive. In relation to her child, there is no supporting

documentary evidence as to the child's birth or parentage provided to the Department or Tribunal nor any reference to or claims in relation to her by the applicant in any correspondence or other documentation at the time of application or decision. In the absence of adequate evidence the Tribunal does not find that this falls within the child exception under the Act.

40. On the basis of the whole of the evidence and information before it, the Tribunal finds that at the time of decision, the requirements of cl. 820.221 are not met.
41. For the reasons above, the applicant does not satisfy the criteria for the grant of the visa.

DECISION

42. The Tribunal affirms the decision not to grant the applicant a Partner (Temporary) (Class UK) visa.

C. Morfuni
Member

ATTACHMENT - Extract from Migration Regulations 1994

1.15A Spouse

- (1) For subsection 5F (3) of the Act, this regulation sets out arrangements for the purpose of determining whether 1 or more of the conditions in paragraphs 5F (2) (a), (b), (c) and (d) of the Act exist.
- (2) If the Minister is considering an application for:
 - (a) a Partner (Migrant) (Class BC) visa; or
 - (b) a Partner (Provisional) (Class UF) visa; or
 - (c) a Partner (Residence) (Class BS) visa; or
 - (d) a Partner (Temporary) (Class UK) visa;

the Minister must consider all of the circumstances of the relationship, including the matters set out in subregulation (3).

- (3) The matters for subregulation (2) are:
 - (a) the financial aspects of the relationship, including:
 - (i) any joint ownership of real estate or other major assets; and
 - (ii) any joint liabilities; and
 - (iii) the extent of any pooling of financial resources, especially in relation to major financial commitments; and
 - (iv) whether one person in the relationship owes any legal obligation in respect of the other; and
 - (v) the basis of any sharing of day to day household expenses; and
 - (b) the nature of the household, including:
 - (i) any joint responsibility for the care and support of children; and
 - (ii) the living arrangements of the persons; and
 - (iii) any sharing of the responsibility for housework; and
 - (c) the social aspects of the relationship, including:
 - (i) whether the persons represent themselves to other people as being married to each other; and
 - (ii) the opinion of the persons' friends and acquaintances about the nature of the relationship; and
 - (iii) any basis on which the persons plan and undertake joint social activities; and
 - (d) the nature of the persons' commitment to each other, including:
 - (i) the duration of the relationship; and
 - (ii) the length of time during which the persons have lived together; and
 - (iii) the degree of companionship and emotional support that the persons draw from each other; and
 - (iv) whether the persons see the relationship as a long term one.
- (4) If the Minister is considering an application for a visa of a class other than a class mentioned in subregulation (2), the Minister may consider any of the circumstances mentioned in subregulation (3).